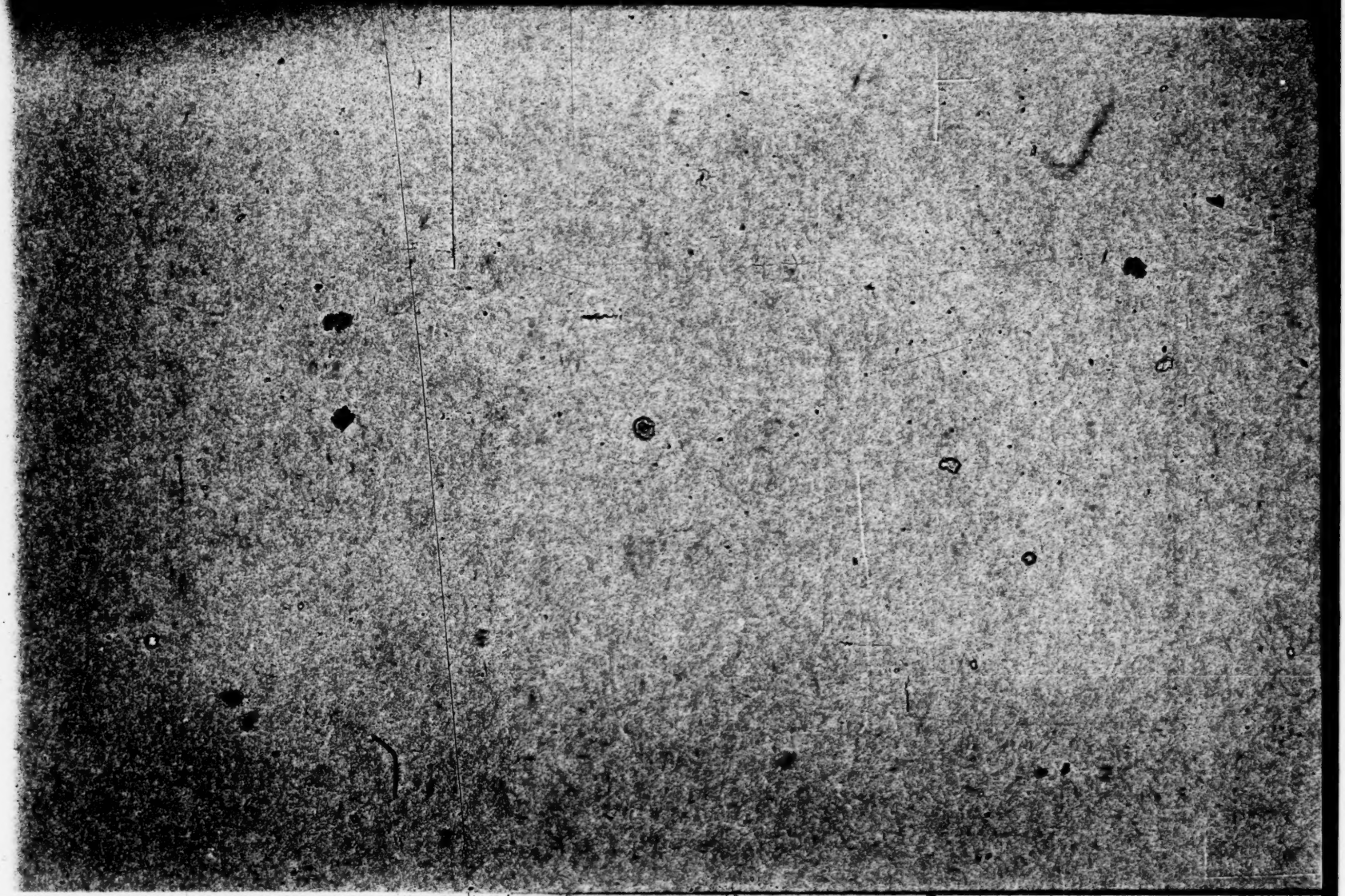

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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 575.

JOHN L. GILVARY,
Petitioner,

vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
Respondent.

BRIEF FOR PETITIONER.

GLEN A. BOONE,
Attorney for Petitioner.

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M. L. BERNSTEEN,
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Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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BRIEF FOR PETITIONER.

This case is here on a writ of certiorari granted on the 11th day of December, 1933, directed to the Supreme Court of Ohio and the Court of Appeals of Cuyahoga County, Ohio.

BRIEF OUTLINE OF CASE IN OHIO COURTS.

Petitioner, herein called Gilvary, sued the Railroad in the Court of Common Pleas of Cuyahoga County, Ohio, and recovered a judgment, his action being based on a violation of the coupler section of the Federal Safety Appliance Act. On error the Court of Appeals of Cuyahoga County, by a majority decision, reversed this judgment and entered final judgment for the Railroad upon the sole ground that a so-called election or acceptance signed by Gilvary at the time of entering the company's employ subjected him to the Compensation Act of the State and barred his Federal right of action. In the highest court of the State, the Supreme Court of Ohio, six judges participating, there was an equal division, which under Article 4, Section 2 of the State constitution operated as an affirmance of the

judgment of the Court of Appeals. By statute in Ohio, the Court of Appeals is required to pass upon all assignments of error and as appears from the journal entry that Court overruled all other assignments of error. The judgment therefore rests exclusively upon the theory that the Federal right asserted by Gilvary was barred by the State statute and the alleged election or acceptance. The text of the journal entry appears at page 50 *infra* and the election and the statute at page 5 *infra*. There is no claim in the case that Gilvary applied for or received compensation. There was no dispute as to the Railroad being a highway of interstate commerce or that Gilvary was injured while on duty as a result of being between the cars in the act of attempting a coupling. The immediate movement of cars at the time of the injury was in intrastate commerce but the cause of action on which Gilvary recovered his judgment rested upon a violation of the Federal Act, a copy whereof is set forth in the Appendix.

OPINIONS OF LOWER COURTS.

Aside from the journal entries in the Court of Appeals and in the Supreme Court, there is no expression of opinion from the Courts of the State as to the basis of their holding. The vital part of the journal entry in the Court of Appeals reads:

> "and the judgment of the Court of Common Pleas is reversed for the reason that the acceptance and notice of election by the employer and employee contract approved by the Industrial Commission of Ohio is a complete bar to a right of recovery in this action and is therefore contrary to law and final judgment is hereby rendered for plaintiff in error (Railroad); no other error appearing on the record * * * Exception."

The entry in the Supreme Court of Ohio contained only a declaration of affirmance, with no statement beyond the fact of an equal division of opinion. (Page 50 *infra*.)

GROUNDS OF JURISDICTION.

Jurisdiction to review this cause on certiorari exists under Judicial Code Section 237(b) as amended by Act of February 13th, 1925, Chap. 229, Sec. 1, 43 Stat. 437, the plaintiff below having based his right of recovery upon a statute of the United States (Section 2, Title 45 U. S. Code) which claim was denied and his rights held to be subject to the provisions of a State statute (G. C. 1465-98) as the exclusive measure of his rights.

GROUNDS OF CERTIORARI.

To avoid duplication of statement, the grounds upon which certiorari was sought, and the propositions of law submitted herein will be stated together:

I.

An employee of an interstate railroad who is injured by a violation of the automatic coupler section of the Federal Safety Appliance Act while attempting a coupling between the cars has a cause of action under said Act, although the movements of such cars was intrastate in character. Such cause of action is not subject to impairment or modification by the Compensation systems of the States.

II.

The States are without power to put either the employer or employee in such case to an election as between Federal rights, defenses and remedies, and such rights, defenses and remedies as may be embraced in a State scheme of compensation, and no such election, whether its form be express or implied, will be operative as against the assertion of the Federal right, defense or remedy.

III.

A written "election and acceptance" by an interstate railroad employee purporting to subject him to a State scheme of compensation, which writing refers to injuries "in intrastate commerce" but contains no reference to causes of action arising under Federal law and expressly limits its operation by the words "and so far as not forbidden by any Act of Congress," and by further words requiring that the work covered by such submission be "clearly separable and distinguishable from interstate commerce," does not constitute a defense to an action based upon the coupler section of the Federal Safety Appliance Act, notwithstanding the immediate movement in which such employee was engaged was intrastate in character.

SUMMARY OF EVIDENCE AND ISSUES AT TRIAL.

The petition was based upon the Federal Safety Appliance Act by express reference, and alleged that Gilvary was injured as a direct and proximate result of being compelled to go between the cars because they had defective couplers that would not couple automatically by impact. There were other specifications of negligence contained in the petition but these were withdrawn at the trial, leaving the single issue as to the defective couplers. The answer (R. p. 12) set out three defenses, a general denial, assumption of risk and the operation of the Ohio Compensation Law. The trial Court withdrew both the second and third defenses from the jury, thus following the injunction of Section 8 of the Safety Appliance Act which bars such second defense and as to the third defense likewise following the various Federal decisions cited *infra*, holding that Workmen's Compensation Laws of the States are not a defense against suits based on Federal Safety Appliance Acts. (R. pp. 189-190.)

The election and acceptance upon which the Railroad based its defense consisted of a copy of the Ohio statute and of the language constituting the alleged submission by Gilvary at the time of entering the Railway's employ. It is as follows:—

"THE INDUSTRIAL COMMISSION OF OHIO,
COLUMBUS, OHIO.

SECTION 51 OF COMPENSATION ACT
(Section 1465-98 G. C.)

The provisions of this Act shall apply to employers and their employees engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer and any of his workmen working only in this State, with the approval of the State liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

ACCEPTANCE AND NOTICE OF ELECTION BY EMPLOYER AND EMPLOYEES UNDER SECTION 51 OF WORKMEN'S COMPENSATION ACT.

TO THE INDUSTRIAL COMMISSION OF OHIO:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and

its undersigned employees, working only in this State, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, hereby elect that their respective rights and liabilities growing out of injury or death to such employees or any of them, or their dependents in case of death, shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury or death is sustained while such employer or employees are engaged in intrastate commerce.

Said employer and employees hereby severally request the Industrial Commission of Ohio to approve their election to operate under the Workmen's Compensation Law of Ohio.

.....

(Employer)

Employees: (Signed) JOHN GILVARY."

In support of his petition Gilvary submitted substantial testimony showing that he made a number of unsuccessful efforts to effect a coupling of the cars by the use of the mechanism supplied for that purpose; that he had many times coupled cars of different kinds at the same point on the track in question; that there was nothing in the curve or condition of the track that had ever hindered the ordinary coupling by impact in previous experiences. While there was conflict in the testimony, Gilvary was corroborated as to the number of attempted couplings by one of defendant's witnesses. As to the place of the accident and the extent of the curve (which the Railroad claimed was such as to excuse non-compliance with the rule of coupling by impact), Gilvary was corroborated by a Railroad witness who said that one of the cars was on the straight track

and that the couplers "were just about at the curve." There was no denial of Gilvary's testimony that, after the coupler on one of the cars failed to function, he was in the act of pulling the drawbar of the other car into proper alignment and had folded his arm around it for that purpose when the cars came together and crushed him. It was open to the jury to find as they did find, that the curve was either non-existent or so slight as to constitute no obstacle to the usual operation of couplers free from defect. (*Atlantic City Ry. vs. Parker*, 242 U. S. 56.) The Court of Appeals of Cuyahoga County, which has power under Ohio law to pass upon the weight of the evidence, reviewed this assignment of error and overruled it. The same observation may be made as to the Railroad's claim that there were tests made in the absence of Gilvary by persons in the company's employ. The record will show that there was an issue of fact as to whether the conditions existing at the time and place of such tests were the same as those obtaining at the time Gilvary was injured. It is not deemed proper to retail this testimony as part of the present brief. If it be the rule that this Court will consider the Railroad contention that the sufficiency of the evidence will be here reviewed, it is submitted that under the most recent decisions, especially *W. & A. R. R. vs. Hughes*, 278 U. S. 496; *Seaboard Air Line vs. Koennecke*, 239 U. S. 352; *San Antonio Ry. vs. Wagner*, 241 U. S. 476 and *P. & R. Ry. vs. Auchenbach*, 16 F. (2) 550, there was substantial testimony sustaining the position of plaintiff below.

BRIEF.

PROPOSITION I.

CAUSES OF ACTION ACCRUING TO RAILROAD EMPLOYEES UNDER FEDERAL ACTS ARE NOT SUBJECT TO STATE SYSTEMS OF COMPENSATION.

A somewhat extended quotation from the leading decision of this Court on this subject seems warranted by the issues in the case, and the rulings of the State Courts. This Court held, in *Texas & Pacific Railway vs. Rigsby*, 241 U. S. 33, as follows:—

> "Syllabus 1. A switchman in the employ of an interstate railway company who was injured through a defect in a hand hold or grab iron forming one of the rungs of a ladder on a box car which he was descending after having set a brake operated from the roof of such car is within the protection afforded by the Safety Appliance Act of March 2, 1893, as amended by the Act of April 14, 1910, Section 2, which commands that all cars requiring secure ladders shall be equipped with them.
>
> Syllabus 2. An employee of an interstate railway company, *though not himself engaged in interstate commerce*, is within the protection of the Federal Safety Appliance Acts of March 2, 1893, March 2, 1903 and April 14, 1910, which impliedly create a private right of action in favor of an employee injured through a violation of the commands of those statutes that certain safety appliances be installed upon railway cars *used upon a highway of interstate commerce*."

The opinion thus deals with the subject (Pitney, *J.*):

> Page 41. "In the exercise of its plenary power to regulate commerce between the states, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. *Congress having*

*entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject matter is excluded.** *Southern Ry. Co. vs. Railway Commission*, 236 U. S. 439. Without the express leave of Congress, *it is not possible*, while the Federal legislation stands, *for the States to make or enforce inconsistent laws giving redress for injuries to workmen* or travelers occasioned by the absence or insecurity of such safety devices, *any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them*; for the consequences that follow a breach of the law are vital and integral to its effect as a regulation of conduct, *liability to private suit is or may be as potent a deterrent as liability to public prosecution*, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. *Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the states is a matter within the control of Congress*; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce—a discrimination certainly not required by anything in the Constitution,—*remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several states, with probable differences in the law material to its effect as regulatory of the conduct of the carrier.* We are therefore brought to the conclusion that the *right of private action* by an employee in-

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* The italics in this brief are those of petitioner unless otherwise indicated.

jured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the act as a regulation of commerce between the states that it is within the constitutional grant of authority over that subject."

The case of *Southern Railway vs. United States*, 222 U. S. 20, involved the power of the Federal government, by civil action, to recover penalties for the violation of the Safety Appliance Acts of Congress against an interstate railroad where the use of the cars was in intrastate commerce. It was there stated, (Van Devanter, *J.*):

> "* * * its (Congress') power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it."

After pointing out that the movement and safety of intrastate and interstate commerce are interdependent, and therefore not independent, the Court said:

> "Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or *results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains.* And so the absence of appropriate safety

appliances from any part of any train is a menace not only to that train, but to others."

The case of *Southern Railway Company vs. Railway Commission*, 236 U. S. 439, cited in *Railroad vs. Rigsby, supra*, involved the power of the states to enact any type of regulatory statutes related to safety appliances upon railroad cars engaged in intrastate commerce. The opinion in that case sets forth with great clearness the basis upon which the Federal government is entitled, because of the organic indivisibility of the subject, to exercise its exclusive power over the equipment, construction and appliances of railroad cars. The opinion reads in part as follows (Lamar, *J.*):

> "But the principle that the offender may, for one act, be prosecuted in two jurisdictions, has no application where one of the governments has exclusive jurisdiction of the subject matter, and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employees. Until Congress entered that field, the states could legislate as to equipment in such manner as to incidentally affect, without burdening, interstate commerce. *But Congress could pass the safety appliance act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that, when exercised, it is exclusive, and ipso facto supersedes existing state legislation on the same subject.* Congress, of course, could have 'circumscribed its regulations' so as to occupy a limited field. But so far as it did legislate, the exclusive effect of the safety appliance act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. *The states*

thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties.''

Quoting further from the opinion:

"* * * it is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject. The principle is too well established to require argument."

The opinion further states:

"The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control."

Following upon the *Rigsby* case came the decision in *Ross vs. Schooley*, 257 F. R. 290 (cert. den., 249 U. S. 615), which was the first decision involving direct conflict between a system of workmen's compensation existent in the state and a cause of action brought under the Safety Appliance Law. The defense in the case was grounded upon the assumed bar imposed by the local compensation law. The opinion as to this point reads as follows:

"Inasmuch as the Congress has created the liability for damages for injury or death resulting from violation of the Safety Appliance Act, no state legislation can alter or impair the Federal right by passing compensation acts.

It is immaterial whether the injured employee was at the moment engaged in interstate or intrastate commerce, because the congressional power that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employees and travelers, regardless of their participation in interstate commerce. A state legislature, therefore, has no more

power to curtail the Federal right of an employee than of a traveler.

What effect a state compensation law has upon a right under the Safety Appliance Act of an employee, who was injured through defective appliances, while coupling intrastate cars on an interstate railroad, has not been directly involved in any case in the Supreme Court cited by counsel or found by us. But our conclusion, which rejects a result that would make the operativeness of the Act dependent upon the legislative wills of the several states, and which aligns that Act with the Employers' Liability Act in substantive and procedural effect, is supported by our understanding of *Schlemmer vs. Buffalo, etc. Ry. Co.*, 205 U. S. 1, and other cases cited."

The most important State decision is *Ward vs. Erie Railroad*, 230 N. Y. 230 (Cert. Den. 256 U. S. 696), the syllabus of which reads in part as follows:—

"1. The purpose of the Federal Safety Appliance Act was not merely to impose a duty but also to create or preserve a right of action for the damages, and the right of action so established is immune from impairment except by Act of Congress.

2. Although he has no remedy under the Federal Employers' Liability Act, an employee of a railroad engaged in interstate commerce who is injured while switching cars, not in aid of any interstate movement, has a right of action for his damages where the injury was caused through violation by the railroad of the Federal Safety Appliance Act, and the Workmen's Compensation Act of the State does not impair such right."

In the opinion of the Court (Cardozo, *J.*), there is this further statement:

"Enough is there to forbid the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, should be dependent for its efficacy upon the pleasure of the States."

In *Director General vs. Ronald*, 265 F. R. 138 (C. C. A. 2, Manton, *J.*), the Federal Court of Appeals, inferentially overruling its previous contrary decision in *Railway vs. Peck*, 226 F. R. 261, held that the local workmen's compensation law of the State was not available as a defense against a cause of action founded upon the Federal Safety Appliance Law. The opinion reads in part as follows:

> "No scheme of compensation such as was embraced in the local workmen's compensation law of the State was available as a defense against a cause of action founded upon the Federal Safety Appliance Law."

The highest Courts of several States have rendered like rulings:

Kenna vs. Railway, 284 Ill. 384;
Kramer vs. C. & N. W. Ry., 148 Minn. 310;
Southern Pacific Railway vs. Henderson, 208 S. W. 561 (Tex.);
Flannigan vs. Railway, 108 Kan. 133;
Miller vs. Reading, 292 Pa. 44.

In *Kenna vs. Railway, supra*, which involved an elective compensation law, the syllabus reads as follows:

> "The Federal Safety Appliance Act applies to an employee of an interstate railroad, though he is not engaged in interstate commerce, and excludes the application of the Workmen's Compensation Act in all cases in which the former Act is applicable, as the compensation act would constitute not only a different remedy for the employee but also a different thing for him to recover, the right of recovery under the Federal act being compensatory damages for the loss sustained and not for a sum based on wages earned."

At page 308 the opinion reads as follows:

> "It is conceded that the Federal Employers' Liability Act excludes the application of the Workmen's

Compensation Act in all cases in which the former Act is applicable. (*N. Y. C. vs. Winfield*, 244 U. S. 147.) The Safety Appliance Act is equally exclusive."

In *Kramer vs. C. & N. W. Ry.*, 148 Minn. 310, the plaintiff's decedent was injured in Michigan while engaged in an intrastate train movement, but brought his action against the defendant in Minnesota based on the violation of the Safety Appliance Act. The defendant interposed the Workmen's Compensation Law of Michigan as a defense, said Michigan act being elective. The syllabus reads as follows:

> 4. A recovery in an action based on the Safety Appliance Act is not prevented by the Workmen's Compensation Act of the State where the accident occurred, though in terms applicable, and though the train movement was intrastate.

The opinion reads in part as follows, stating that the question was:

> "Whether, if the deceased was engaged in intrastate commerce and was killed by a failure of the defendant to observe the Safety Appliance Act, a recovery in an action based on the statute is prevented by the Workmen's Compensation Act of Michigan, where the accident occurred, the Compensation Act being in terms applicable and the deceased subject to it?
>
> It is claimed that since the deceased was engaged in intrastate commerce, compensation is to be had under the Compensation Act of Michigan, and that an action based on the Safety Appliance Act does not lie. This question was considered in *Ross vs. Schooley*, 257 Fed. 290, before cited. The conclusion was that the Workmen's Compensation Act did not prevent a recovery for death caused by a violation of the Safety Appliance Act in an appropriate action founded on the statute, though the Compensation Act was in terms applicable and the deceased subject to it. *Taking the case as controlling, the same result follows here.*"

In *Southern Pacific Railway vs. Henderson*, 208 S. W. 561 (Texas Civil Appeals, 1919), the plaintiff was injured in California while engaged in intrastate commerce, but brought his action against the defendant in Texas. The defendant interposed the Workmen's Compensation Law of California as a defense, said Compensation Act being elective. The defendant contended that the courts of Texas had no jurisdiction; that the injury was sustained in California and that Henderson was engaged in intrastate commerce; that the California Workmen's Compensation Act gave the Industrial Accident Board exclusive jurisdiction. The syllabus reads as follows:

> 1. In a servant's action for injuries based on the defendant railroad's violation of the Federal Safety Appliance Act, the master's liability was enforcible in courts of Texas without reference to the laws of California where the tort occurred.

The Court said, in its opinion, as follows:

> "Plaintiff alleged and proved violation of the Federal Safety Appliance Act as the proximate cause of his injuries. This was the only ground of negligence submitted in the charge. In this condition of the record the Court properly gave the instruction complained of. Under the pleadings, evidence and charge, plaintiff's right of recovery was bottomed upon the Safety Appliance Act, and the California statute as to his right and remedy was without application."

To the same effect:

> *Ballard vs. Sacramento N. R. Co.*, 14 Pac. (2nd) 1045, (Decided Oct. 1932).

It would seem that the foregoing authorities should have been accepted as conclusive of the question presented. Since they were not so accepted by a sufficient vote in the Courts of the State and since the Railroad is insistent that the Federal power is subservient to that of the State in

respect to the subject matter, it is appropriate to set forth the further authorities available on the question of the exercise of Federal power over intrastate matters.

In *Houston etc. Ry. vs. United States*, 234 U. S. 342, it was held:

Syllabus 1:

> Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse *from being used in their intrastate* operations to the injury of interstate commerce.

Syllabus 2:

> Congress has the power to control the *intrastate rates* maintained by a carrier under State authority to the extent necessary to remove the resulting unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves.

Syllabus 4:

> The authority of the Interstate Commerce Commission to remove discriminations against interstate traffic under the Act of February 4, 1887, includes the power to control the *intrastate rates* maintained by a carrier under State authority to the extent necessary to remove the resulting unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves, notwithstanding the proviso in Section 1 of that Act, that its provisions shall not apply to purely intrastate traffic.

The opinion of Hughes, *J.*, for the Court, reads as follows:

> "Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement'; (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety'; (*Mobile County vs.*

Kimball, 102 U. S. 691, 696, 697); 'to foster, protect, control, and restrain'; (*Second Employers' Liability Cases—Mondou vs. New York, N. H. & H. R. Co.*, 223 U. S. 1, 47, 53; 54). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. *The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule*, for otherwise Congress would be denied the exercise of its constitutional authority, *and the State, and not the Nation, would be supreme within the national field.*"

The opinion reviewed *B. & O. R. R. vs. Interstate Commerce Commission*, 221 U. S. 612, where the argument against the Hours of Service Act centered upon the invasion of the field of intrastate employment. That case—

"involved the consideration that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employees so that those who were engaged in

interstate commerce should be confined to that commerce exclusively. Employees dealing with the movement of trains were employed in both sorts of commerce; but the Court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers, or by the commingling of duties relating to interstate and intrastate operations."

The Court also noted the decision in *Southern R. R. vs. United States*, 222 U. S. 20, upholding the amendment of 1903 to the Safety Appliance Act, from which quotation has been made, *supra*.

In the *Second Employers' Liability Cases*, 223 U. S. 1, the Court, upholding the present Federal Act upon the subject of railway employees, used the following language (Van Devanter, *J.*):

"As is well said in the brief prepared by the late Solicitor-General: 'Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. *If the agents or instruments are destroyed* while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will

prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. *Therefore, Congress may legislate about the agents and instruments of interstate commerce,* and *about the conditions under which those agents and instruments perform the work* of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the Interstate Commerce Act.' "

If it be claimed that the State has some form of reserved power in applying the Workmen's Compensation Law to a Federal subject matter upon the theory that a favor is being conferred upon the employee, the answer is found in *Charleston, etc. Railway vs. Varnville Furniture Co.*, 237 U. S. 597, 59 L. ed. 137, holding that when Congress has taken jurisdiction of the particular subject matter

"coincidence is as ineffective as opposition and a State law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

The principle of the *Houston* case, *supra*, is again applied in *New York, etc. vs. United States*, 257 U. S. 591, where discriminatory intrastate rates were the subject of a Federal order, which this Court upheld.

Closely allied to the principle under examination is that under which the States are excluded from the exercise of authority over a subject as to which Congress has enacted proper legislation.

In *Napier vs. Atlantic Coast Line R. Co.*, 272 U. S. 606, it was held:

Syllabus 1:

Congress may regulate locomotive equipment used in a highway of interstate commerce so as to preclude state legislation.

Syllabus 4:

The power conferred upon the Interstate Commerce Commission by the amendment in 1924 of the Boiler Inspection Act, to prescribe requirements and establish rules to enforce compliance with the requirements that locomotives, boilers, tenders, and all parts and appliances thereof, are in proper condition and safe to operate, occupies the entire field so as to exclude state power to require automatic doors to fire boxes, and cab curtains.

Also in *New York Central R. R. Co. vs. Winfield*, 244 U. S. 147, this Court held:

Syllabus 2:

Nothing in the Federal Employers' Liability Act points to any purpose to leave the states free to require compensation from an interstate carrier for injuries to its employees where the act withholds it.

Syllabus 5:

If Congress have constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, state legislatures have no right to interfere, and by way of complement to the legislation of Congress to prescribe additional regulations for what they deem auxiliary provisions for the same purpose, for in such cases the legislation of congress in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter.

Syllabus 6:

The Federal Employers' Liability Act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability, it being a regulation of the carriers' duty or obligation as to both, and the reasons which operate to prevent the state from dispensing with compensation where the act requires

it equally prevent them from requiring compensation where the act withholds or excludes it.

Opinion p. 685 (Van Devanter, *J.*):

"Only by disturbing the uniformity which the act is designed to secure, and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg vs. Pennsylvania*, 16 Pet. 539, 617:

> 'if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it.'

Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both."

Further, in *Michigan Central R. Co. vs. Vreeland*, 227 U. S. 59, it was said in the Opinion, by Lurton, *J.*:

"Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample.

> * * * By this Act (Federal Employers' Liability Act) Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. * * * It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the states."

To the same effect, *Southern Ry. vs. Ry. Com.*, 236 U. S. 439.

Recurring to the immediate subject of inquiry, attention is called to the scope of Federal action under the form of Safety Appliance regulation. Since 1903 carriers are obligated to comply with direct statutory enactment or with orders of the Interstate Commerce Commission upon the following subjects, irrespective of the question of intrastate commerce: train brake or air brake systems; automatic couplers; grab irons; hand holds; height of draw bars. By the amendment of 1910 uniformity of safety appliances was sought to be attained and further provisions were added as to sill steps, hand brakes, ladders, running boards, etc. By this exercise of power the field of Federal control was greatly enlarged and the number of employees in both interstate and intrastate commerce who are brought within the protection of the Act is very considerably increased. The Interstate Commerce Commission was empowered to issue standardizing orders after hearings. It may be noticed parenthetically that whereas the original Act was silent as to the cause of action founded upon it, as declared in the *Rigsby* case, (except for the reference to non-assumption of risk) the amendment of 1910, section 4,

contained the provision that if a disabled car were being hauled to a place of repair (as it might be without penalty), the carrier should not thereby escape "liability to any remedial action for the death or injury of any railroad employee." (See Appendix page 41 herein.)

Thereafter the Federal departments continued to exercise the authority conferred and the order of the Interstate Commerce Commission of 1911 covered the subject comprehensively as to the number, location, dimensions and manner of application of sill steps, hand holds, brakes, etc. upon almost all forms of rolling stock and locomotives. From these considerations it is obvious that unless the doctrine of *Railway vs. Rigsby* is to be departed from, the penalties and the "potent deterrent by civil action" referred to in that decision have constituted and still constitute a powerful stimulant to law observance on the part of the carriers. The present case is the first example of an effort to substitute for the liability heretofore recognized and imposed, a new and modified form of responsibility to be determined and administered by an administrative tribunal of a State and otherwise than according to the course of the common law. It must be remembered that at the time of the enactment of the original Act as well as at the time of the first amendment in 1903, Congress could not have had in contemplation any such modification of its legislation as is here attempted to be justified. At those dates Workmen's Compensation Acts were not known. The remedy, and the only remedy, which Congress had in legal contemplation was one according to the course of the law. Since it has been declared by this Court that the principle of Workmen's Compensation is not according to the course of the common law (*Southern Pacific vs. Jensen*, 244 U. S. 205), it cannot reasonably be asserted that that form of compensation was in contemplation or that it constitutes a "punitive sanction" within the meaning of the opinion in *Railway vs. Rigsby*.

The contention of the Railroad in the instant case is in effect that the Federal protection for the human agency is not co-extensive with Federal authority over the mechanical agency; that although an employee is injured by a violation of a Federal statute or order, which violation is subject to penalty under the criminal section of the Act, notwithstanding that the movement is wholly in intrastate commerce, yet as to the civil consequences the States are clothed with power to intervene and substitute their own provisions for those established by Congress and by this Court in its various interpretations of the Federal Act. Such a result manifestly will do violence to the numerous decisions here cited. It will constitute an amendment of a Federal Act by State legislation. It will be a delegation of power to the states, as was held in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. It will produce the same degree and extent of disharmony and lack of uniformity in the enforcement of Safety Appliance Acts that was denounced as a danger in *New York Central R. R. vs. Winfield, supra*, with respect to the Federal Employers' Liability Act. And from the viewpoint of the carrier it embraces in the scheme of compensation not only the cases where the carrier is liable but the cases where it is not. While the employee cannot directly urge the grievance of his employer, yet since the instant litigation rests upon the theory of contract advanced by the defendant below, if the contract is void because of the absence of power on the part of the State to enact the statute which supports it, the petitioner should not be regarded as remaining bound. Within the authority of *New York Central Railroad vs. Winfield, supra*, it is submitted that no State has power to establish a system under which carriers, against which no liability exists (as in cases of safety appliance injuries caused by Act of God, by inevitable accident or sole fault of the employee), can be subjected to a liability where the Act

withholds it. And if it be urged that where the carrier has voluntarily "by contract" elected to avail itself of such a local system of law, the answer will be found in the decisions of this Court in a later section of this brief showing conclusively that no State has power to exact or provide for such election.

II.

THE STATES ARE WITHOUT POWER TO PUT THE PARTIES TO AN ELECTION SUCH AS WAS EXACTED IN THE INSTANT CASE.

This phase of the argument is likewise controlled by authority. With relatively unimportant exceptions every case in this Court and in the lower Federal and State Courts has recognized that the states are not empowered to put employer or employee to an election as between a Federal right, remedy or defense, on one hand, and a State-granted right, remedy or defense on the other.

In *Director General vs. Ronald*, 265 F. R. 138 (C. C. A. 2—Manton, *J.*), it was held, inferentially overruling a previous contrary opinion by the same Court, that:—

> "It is beyond the power of any State to interfere with the operation of a Federal Act such as by putting carriers and their employees to an election between its provisions and those of the State acts, or imputing an election to them through a statutory presumption. The Federal Act is intended to operate uniformly in all the States as respects its application, rights and remedies conferred and is therefore paramount and exclusive."

Likewise, in *Erie Railway Co. vs. Winfield*, 244 U. S. 170, it was held:—

> "The operation of the Federal Employers' Liability Act of April 22nd, 1908, governing the liability of interstate railway carriers for the death or injury of their employees while employed in interstate com-

merce, cannot be interfered with by a State either by putting the carriers and their employees to an election between the provisions of that statute and a State Workmen's Compensation Act, as is attempted by New Jersey Laws 1911, Chap. 95, or by imputing such an election to them by a statutory presumption."

It should be noted that this syllabus covers two phases of the operation of becoming bound by the State law, to-wit:

"putting the carriers to an election"

which covers the case of voluntary action, or,

"imputing such an election to them by a statutory presumption."

Both operations fall equally afoul of the law. At page 173 the opinion of Mr. Justice Van Devanter reads, in part:—

> "This part is described as 'elective,' and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender 'their rights to any other method, form, or amount of compensation or determination thereof.' Respecting the mode of manifesting such an agreement or the contrary, it is provided that 'every contract of hiring shall be presumed to have been made' with reference to this part of the statute, and, unless the contract or a notice from one party to the other contain 'an express statement in writing' to the contrary, it 'shall be presumed' that the parties 'have agreed to be bound' by this part of the statute."

It will be shown under a later caption that the basis of the decisions in the New Jersey Courts (which the above decision reverses) was the same elemental concept of contract which the Ohio reviewing Courts in the instant case seem to have followed and which the Railroad still urges.

This Court having held that State systems of compensation are valid whether voluntary or compulsory

(*Mountain Timber Company vs. Washington*, 243 U. S. 219; *Hawkins vs. Bleakley*, 243 U. S. 210; *New York Central vs. White*, 243 U. S. 188), it becomes of no moment whether the supposed contract is express or implied, or whether the relationship arises out of action or inaction, or is the result of a conclusive presumption. Such is the holding in the following cases:—

Employers' Liability Corp. Ltd. vs. Cook, 281 U. S. 233, deciding as follows:

> "State Workmen's Compensation Law, *though elective in form*, is not applicable in the case of an employee injured while unloading a vessel."

In that case the injury took place while the claimant was unloading a boat at Houston. Under the Texas law the compensation act is wholly elective as to both employer and employee and either might refuse to be bound thereby. Both had "elected" within the meaning of the local law. After holding that the claimant's employment was essentially within Federal cognizance, the Court declared that under the circumstances disclosed the State of Texas (McReynolds, *J.*)

> "lacked power to prescribe the rights and liabilities of the parties growing out of the accident. *The fact that the compensation law of the State was elective in form does not aid the respondents.* The employer did not surrender rights guaranteed to him by the Federal law merely by electing to accept one of two kinds of liability in respect of matters within the State's control, either of which she had power to impose upon him."

Baizley Iron Works vs. Span, 281 U. S. 222, where this Court held that the provisions of a local compensation act could not embrace an employee engaged in making repairs to a completed vessel lying in navigable waters. The case originated in Pennsylvania, where the statute declared, with reference to workmen's compensation, that:

> "There shall be a *conclusive presumption* that both employer and employee accept its provisions unless one of them makes written statement to the contrary."

Irrespective of the conclusive and final character of the consent which Span, the employee, was charged with by law, it was held that his remedy lay in admiralty and was enforcible by Federal law, and that he had no claim under the compensation law of the State.

Also, in the case of *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, this Court held that the provisions of the local compensation act were not applicable to a stevedore engaged in unloading a vessel lying in navigable waters. The case originated in New York. The Court held that the compensation act of New York would not apply. The syllabus of this case reads in part as follows:

> "State legislation changing, modifying, or affecting the general maritime law which contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of such general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations, is invalid * * *."

It is of interest to note that the section of the New York Workmen's Compensation Law involved in the *Jensen* case is identical with Section 1465-98 of the Ohio General Code, under which the "election" was made in the instant case. The New York Court of Appeals had occasion to contend with the tortuous language of that section, and characterized it as "awkwardly phrased," 109 N. E. Rep. 600. This Court, without attempting to construe the peculiar wording of the statute, held that since the subject matter was of maritime, and hence Federal, cognizance, the compulsory scheme of State compensation was without effect upon the rights of the parties.

In *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, it was held that even an Act of Congress could not be allowed to invade the field of admiralty law by making available therein the provisions of State workmen's compensation laws, since that would destroy the uniformity contemplated by the Constitution.

In *Duart vs. Simmons*, 231 Mass. 313, it was held that:

> "Where an injury occurred while the plaintiff was employed in the discharge of a cargo of coal from a vessel lying in navigable waters, it was held that his work and injury were maritime in their nature, and that the Massachusetts Workmen's Compensation Act was inapplicable, notwithstanding the fact that the Act was elective, both with the employer and the employee."

The Court said, in its opinion:

> "The ground of the *Jensen* decision, as we understand it, is that the kind of legislation represented by workmen's compensation acts is beyond the jurisdiction of the States, so far as it relates to admiralty and maritime affairs. *The reasoning of that decision seems to us to apply equally to an elective as to a compulsory workmen's compensation act. Consent of parties cannot confer jurisdiction.* A statute which in its nature is outside the jurisdiction of the State, because within the exclusive domain of the Federal government, cannot confer rights or be a bar to the enforcement of common-law obligations."

The same principle was followed where the compensation act was elective or optional in the following cases:

Neff vs. Industrial Commission, 166 Wis. 126;
Soderstrom vs. Curry and Whyte, 143 Minn. 154;
Thornton vs. Grand Trunk Ry., 202 Mich. 699;
O'Brien vs. Scandinavian American Line, 94 N. J. 244.

From these decisions it is, we believe, sufficiently evident that where the Federal Courts have indicated a purpose to preserve the uniformity of remedies for causes of action created by Federal enactment, it is not competent for the States, by any type of legislation or by the substitution of remedies of their own choosing, to set aside the Federal provision.

It is equally evident, we believe, that under said body of decisions there is no authority in the State, or any of its divisions, to require either the employer or employee to make an election as between the Federal remedy and that provided by the State.

The decisions as to admiralty jurisdiction present a flexibility admitting certain types of maritime injuries to be adjudicated under State law, which is totally absent from the decisions respecting liability under the Federal Safety Appliance Law. In the latter case we find an apparent determination to preserve the Federal remedy intact in a manner resembling or parallel to the principle which has been adopted as to the Federal Employers' Liability Law. It is noteworthy that the case of *New York Central R. R. vs. Winfield, supra*, was not based upon Section 5 of the Employers' Liability Act which voids all devices, etc., but upon the ground that when Congress had occupied the field any attempt on the part of the States to substitute a compensation system as a remedy was an interference.

In keeping with the foregoing decisions are those which base like holdings upon the strict principle of jurisdiction. In *Christenson vs. Morse Dry Dock Co.*, 214 N. Y. S. 734, five judges concurring, held that an attempted voluntary submission under Section 113 of the New York law (the counterpart of Section 1465-98 of the Ohio General Code here involved), would not confer jurisdiction upon the State Commission where the subject matter was maritime,

since the submission could not invest the tribunal with power even by consent. A like result was arrived at by the Supreme Court of Ohio, where a voluntary submission by maritime employees to the State Commission was held ineffective to clothe the Commission with any power over a matter essentially Federal in nature.

State ex rel. vs. Duffy, 113 O. S. 96 and 579. See, to the same effect; *Duart vs. Simmons*, *supra*.

Throughout the litigation of the instant case in the Courts of Ohio, counsel for the Railroad have rested their argument chiefly upon the doctrine of a contract relation between the employer and the employee based upon the "election and acceptance" document, (*supra*, page 5). This theory seems to have been carried into the journal entry already cited. The principal authority advanced in brief and argument in support of the view that the contractual feature of the writing effected a complete transfer of the employee from Federal to State control is *Berry vs. Donovan and Sons*, 120 Maine 457. That case decided that a longshoreman injured upon a wharf was within the State compensation system by virtue of a previous election under the compensation law of the State. The decision on the facts is entirely correct and in keeping with what this Court held in *State Industrial Commission vs. Nordenholt*, 259 U. S. 263, and many other cases. However, the Maine Court went far afield in stressing the contractual phases of the election (which this Court had uniformly treated as immaterial) and apparently believed that the jurisdiction sprang from the contract. Since this view evidently misled the Ohio Courts in the present case, it is important to recall that the principle has been definitely rejected by this Court, not only in general terms but by specific ruling.

In the case of *Employers' Liability Company vs. Cook*, cited *supra*, this Court reversed the holding of the Fifth

Court of Appeals (31 F. (2) 497), in which a majority of that Court, also influenced by the argument of contract, held that because the employee of the Ford Motor Company and the Company itself had by voluntary election become subject to the Texas Compensation Law, the redress of the injured employee must be sought under that law, even though the employment was essentially maritime. The Court placed reliance upon the Maine case in arriving at its conclusion, stating that—

> "any liability in this case arises out of a contract, the enforcement of which cannot affect any principle of the admiralty law."

We have already noted the reversal of this decision by this Court upon the ground that an election by the employer as between two kinds of local liability did not force him to surrender rights guaranteed to him under Federal law.

There is nothing novel in the argument that employer-employee relationships under compensation laws have a contractual base. This Court has reviewed other cases where this phase of the status of the parties was urged as a reason for transferring control from Federal to State cognizance. The idea was either directly involved or implicit in *New York Central R. R. vs. Winfield, supra*, and more particularly in *Erie Railroad vs. Winfield, supra*. In the latter case, the third question stated was:

> "Whether, by reason of the State statute *the carrier became bound contractually to make compensation in this instance* even though it came within the Federal Act."

In the State Court (88 N. J. L. 619) it had been held:

> "What the appellant in the present proceeding seeks to enforce against the defendant company is not a liability arising out of its negligence, *but a contractual obligation created by section 2 of our workmen's compensation act with the consent of both employer and*

employee, and which exists although no negligence can be imputed to the employer. And this we consider she is entitled to do in the absence of any averment by her, or any proof offered, or any admission made by the defendant company showing that the death of her decedent resulted from defendant's negligence, and thus created a liability against it under the Federal statute."

See also, *Hammill vs. Pa. Co.* (N. J. L. 1915) 94 Atl. 313, stressing the contractual element in compensation cases.

We need not repeat the ruling made in this Court upon the issue thus presented; nor need we stress the fact that there is no operative or practical distinction in the cases as between elective and compulsory compensation acts. The assent or election, whether based upon a presumption or upon inaction, or whether accomplished ritually, would still leave the parties exactly where the boundaries between Federal and State power have left them. No amount of solemnity in executing an election can leap across the divisions established between Federal and State powers, especially where there is involved the investing of State functionaries with powers emerging solely from the attempted compact of the parties themselves but not conferred by any law. This is believed to be one of the bases of the repeated statement in the above cited decisions of this Court that the form and manner of assent or election in these cases, whether by express agreement or otherwise, are immaterial.

It is the theory of this brief that the consistent denial, by this Court, of the right of the States to put employer or employee to an election as between Federal and State rights and remedies rests upon the ground of interference. This interference arises out of the practical operation of the process of "putting to an election." In many, if not all cases, election as prescribed or tendered by Compensa-

tion Acts consists of a choice between two remedies or statutory systems which are so devised as to present alternatives, one of which is made discriminatory and prejudicial in order to clothe the other with allurement. The removal of defenses, in the case of the employer, and the subjection to defenses, in the case of the employee, are the most familiar examples. It is clear that if such a tendering of a dilemma to parties were to be permitted to the States in respect of Federal rights, remedies or defenses, the coercive nature of such legislation could constitute a serious interference with the rights of the parties under the paramount law. While the consideration is legislative rather than judicial, it is not unimportant that under such a system of elections an employee could be brought to a complete surrender of all rights under Federal statutes as a condition of obtaining employment. But on the other hand, it is conceivable that the States might devise a system such that the employer could be placed at a disadvantage unless he too submitted to the State as against the Federal provision.

If the status of the parties as to Federal rights and remedies is susceptible of State control on the principle of contracts authorized by State law, then all States may by variant enactments make (if they have not already made) like provision with like results. Since there is no difference in principle between—

(a) An actual contract between employer and employee, or

(b) An implied contract grounded upon the incorporation of the statute, or

(c) A conclusive presumption of submission

(which is at best a mere adoption of the statute)

it follows that all States wherein Compensation Laws are in operation should be regarded as empowered to absorb large groups of rail employees into the State systems

without regard of the constantly broadening protection sought to be accorded them under the Federal Safety Appliance Act. . . .

Concluding this phase of the discussion, attention is called to a thorough repudiation of the contract principle of the Maine decision appearing in *Bell vs. Southern Casualty Co.*, 267 S. W. Rep. 531 (Tex. Civil App.), stating that the overwhelming weight of authority in this country was opposed to the principle of that decision.

III.

THE WRITING ACTUALLY INVOLVED IN THE CASE DOES NOT BEAR THE INTERPRETATION AS MATTER OF LAW THAT IS ASCRIBED TO IT, SINCE IT MAKES NO REFERENCE TO FEDERAL RIGHTS OR REMEDIES BUT ON THE CONTRARY EXPRESSLY EXCLUDES THEM.

For convenience in the examination of this proposition we again set out the language of the election and acceptance as signed by the employee:—

"THE INDUSTRIAL COMMISSION OF OHIO,
COLUMBUS, OHIO.

SECTION 51 OF COMPENSATION ACT

(Section 1465-98 G. C.)

The provisions of this Act shall apply to employers and their employees engaged in intrastate and also in interstate and foreign commerce, *for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate* and foreign *commerce*, and then only when such employer and any of his workmen working only in this State, with the approval of the State liability board of awards, *and so far as not forbidden by any act of Congress*, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

ACCEPTANCE AND NOTICE OF ELECTION BY EMPLOYER AND EMPLOYEES UNDER SECTION 51 OF WORKMEN'S COMPENSATION ACT.

TO THE INDUSTRIAL COMMISSION OF OHIO:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and its undersigned employees, working only in this State, whose mutual connection with *intrastate* work *is clearly separable and distinguishable from interstate* and foreign *commerce*, hereby elect that their respective rights and liabilities growing out of injury or death to such employees or any of them, or their dependents in case of death, *shall*

be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury or death is sustained while such employer or employees are engaged in *intrastate commerce;*

Said employer and employees hereby severally request the Industrial Commission of Ohio to approve their election to operate under the Workmen's Compensation Law of Ohio.

.....

(Employer)

Employee: (Signed) JOHN GILVARY,"

At the beginning it would be conceded that no contract, election or acceptance executed by the parties could be broader than the Act upon which it is based. In addition the election as written declares that it is subject to the provisions of the compensation law. Hence all limitations contained in the statute are incorporated in the election.

The basic limitation is that the election does not operate upon the activities of the parties, except where "their mutual connection with intrastate work is clearly separable and distinguishable from interstate commerce." Following this limitation is another: The election is to be allowed only such scope "as is not forbidden by any Act of Congress." A third phase of the law, and therefore of the election, is that where "a liability or method of compensation may be established by Congress" the operation of the local system is abrogated except where the work is clearly distinguishable from interstate commerce.

Literally read, the statute and the election contemplate the inclusion of employees in interstate commerce. (*Jensen* case, 109 N. E. 600.) It is possible that this language is an attempt to occupy the field left unoccupied by Congress, following the early decisions by the Courts of New York

and New Jersey. (*Cf. Erie Ry. v. Winfield, supra.*) In any event, it is submitted that the purpose of the statute and of the election as properly interpreted is to avoid any conflict with the Federal rights or defenses of the parties. Since there are manifest ambiguities in the wording, a Court having recourse to rules of construction would assume that it was not the intent of the legislature to invade a field beyond its jurisdiction. But even in the absence of the doubtful words of the Act, it is clear that it is not inclusive of that which a Federal statute forbids; and it requires no repetition of authority to show that the occupancy by Congress of a given field operates as an exclusion and prohibition upon the States with reference to the subject. The continuing power and control of Congress over the remedy for a violation of a Federal Act is itself a prohibition to the States as to further or other remedies.

If Gilvary had been injured in intrastate commerce without more, that is, with no involvement of Federal rights, it may be assumed that the Act would apply and that the Railroad would owe compensation even for non-negligent injury. But he was not injured in intrastate commerce in circumstances "clearly separable and distinguishable from interstate commerce." Quite the contrary, the injury was sustained in such relation to interstate commerce as that a Federal Act relative to that commerce was violated at the moment of the injury. To say that the intimacy of the relationship to interstate commerce was such as to support the Federal power over the mechanical appliance, but that the employee injured by the same delict must be regarded as engaged in a movement "clearly separable and distinguishable" from such commerce is manifestly untenable. And this is especially true when we are dealing with a document which is to be interpreted in the light of the Federal decisions on the subject of elections in such matters by employers and their em-

ployees. Since General Code of Ohio Section 1465-98 could not constitutionally put either the Railroad or Gilvary to an election as between local and Federal rights, defenses or remedies, any document such as this, procured from the employee upon his entering the employment of the Railroad, and executed long in advance of the injury, should be read so as to avoid a conflict between the State and Federal provisions, and the parts of such document seeking to avoid any such conflict should be given controlling effect.

Since the State courts gave to this writing an effect subversive of a Federal statute and of rights asserted by Gilvary thereunder, it is competent for this Court to give to this election and acceptance the interpretation which, as a matter of law, it bears, and to declare the rights of the parties in the light of that interpretation. The result should be the reversal of the judgment of the Supreme Court of Ohio and of the Court of Appeals of Cuyahoga County and the affirmance of the judgment of the Court of Common Pleas of Cuyahoga County in favor of John Gilvary vs. The Cuyahoga Valley Railway Company.

Respectfully submitted,

GLEN A. BOONE,

Attorney for Petitioner.

BERNSTEEN & BERNSTEEN,
M. L. BERNSTEEN,
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Of Counsel.

APPENDIX.

THE FEDERAL SAFETY APPLIANCE ACTS.

AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Section 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in ac-

cordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Sec. 5. That within ninety days from the passage of this Act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Sec. 6. [As amended April 1, 1896.] That any such common carrier using any locomotive engine, running any

train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: Provided, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Sec. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this Act.

Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

AN ACT to amend an Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

Section 1. That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

SEC. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than

fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall except as specifically amended by this Act, apply to this Act.

AN ACT to supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

Section 1. That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

Sec. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Sec. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give

notice of such designation to all common carriers subject to the provisions of this Act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said Commission is hereby given authority after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission.

Sec. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six:

Provided, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

Sec. 5. That except that, within the limits specified in the preceding section of this act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities,

or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this act.

SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.

JOURNAL ENTRIES.

CUYAHOGA COUNTY COURT OF APPEALS.
December 28th, 1932. To Court:

This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed, for the reason that the acceptance and notice of election by the employer and employee contract approved by the Industrial Commission of Ohio, is a complete bar to a right of recovery in this action and is therefore contrary to law, and final judgment is hereby rendered for plaintiff in error; no other error appearing on the record, and this cause is remanded to said Court of Common Pleas to carry this judgment into execution. The defendant in error excepts. Levine, *Judge*, dissents. Journal 9, page 466.

SUPREME COURT OF OHIO.
October 25, 1933.

Error to the Court of Appeals of Cuyahoga County. This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it appearing that the Judges of the Court are equally divided in opinion as to the merits of this case (one Judge not participating) and are for that reason unable to agree upon a judgment, and the entry of the fact constituting an affirmance of the judgment of the Court of Appeals, it is ordered that the defendant in error recover from plaintiff in error its costs herein expended, taxed at $.....; and it appearing to the Court that there were reasonable

grounds for this proceeding in error, it is ordered that no penalty be assessed herein. Ordered, That a special mandate be sent to the Court of Common Pleas of Cuyahoga County, to carry this Judgment into Execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County "for entry." J. No. 33, page 282.